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Nos. 02-1215 and 02-1265

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SEA ROBIN PIPELINE COMPANY IN OPPOSITION

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QUESTION PRESENTED

Where the Federal Energy Regulatory Commission ("FERC") does in fact regulate Respondent Sea Robin Pipeline Company's rates under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (2000), and where FERC approved a rate settlement between Sea Robin and the parties below (including most Petitioners) which is binding on *all* parties, are these cases unripe, or moot?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent Sea Robin Pipeline Company states that it is a wholly owned subsidiary of CMS Energy Corporation, a publicly traded company. The only other affiliates of Sea Robin Pipeline Company which have issued shares or debt securities to the public are Consumers Energy Company and Panhandle Eastern Pipe Line Company.

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BRIEF FOR RESPONDENT SEA ROBIN PIPELINE COMPANY IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes included in the Petitions, these cases also involved Section 5 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717d (2000), and a provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 (2000). They are reproduced in the Appendix.

STATEMENT

The facilities of Respondent Sea Robin Pipeline Company ("Sea Robin") are at issue in these cases. Both Petitions proceed from a fundamentally mistaken premise. Consequently, a comprehensive brief in opposition is unnecessary.

REASONS FOR DENYING THE WRIT

1. Both Petitions claim that Respondent Federal Energy Regulatory Commission ("FERC"), as a result of its various orders below, does not assert rate regulation over Sea Robin's offshore production and gathering facilities under the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (2000)("NGA"). *See, e.g.*, Petition of The Producers Coalition in No. 02-1215 at 9 ("By withdrawing important federal safeguards that protect captive [Outer Continental Shelf] gas producers against the exercise of monopoly power by OCS pipelines, the FERC's orders at issue undermine Congress' purpose to afford consumers of interstate gas services a "complete, permanent and effective bond of protection from excessive rates and charges [footnote omitted]"); *see also id.* at 15; *see* Petition of ExxonMobil Marketing Company, *et al.* in No. 02-1265 ("ExxonMobil Pet." at 10, 28) ("Moreover, the only purpose for which pipelines like Sea Robin seek reclassification is to avoid rate regulation."). Both Petitions therefore seek this Court's review because they complain that the effect of FERC's orders, as affirmed by the Court of Appeals, deprives them of statutory rate protection under the NGA.

2. However, in an order dated February 15, 2001 in Docket No. CP95-168-005, FERC held that Sea Robin's offshore facilities *are* subject to Sections 4 and 5 of the NGA, 15 U.S.C §§ 717c and 717d (2000). *Sea Robin Pipeline Co.*, 94 F.E.R.C. ¶ 61,137 (2001).[1] That order is final, was not appealed by any party, is no longer appealable, and was not cited in either Petition. Accordingly, Sea Robin's offshore

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[1] *See* FERC's June 30, 1999 Order on Remand from the decision of the Fifth Circuit Ordering ¶ (C)(ExxonMobil Pet. at 93a), subjecting Sea Robin's Outer Continental Shelf ("OCS") facilities to NGA rate regulation and requiring Sea Robin to file tariffs reflecting its offshore gathering rates. It was that Ordering ¶ (C) paragraph that led to the February 15, 2001 FERC order and resulting settlement agreement process described in ¶¶ 2 and 3 of this Brief.

facilities are considered by FERC to be subject to the very rate-regulatory provisions of the NGA to which Petitioners would have this Court subject them.

3. Even more remarkably, Petitioners (or their affiliated or predecessor interests) and Sea Robin subsequently entered into a settlement agreement, approved by FERC, agreeing to rates with respect to Sea Robin's gathering facilities, to implement FERC's February 15, 2001 order discussed *supra* in ¶ 2. *Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 61,263 (2002), *approving Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 63,023 (2002); *see id.* at n.2 (listing parties to settlement agreement, including Petitioners). The existence of that settlement agreement, and the fact that Petitioners (or their related interests) are subject to it, also were not disclosed in either Petition. All parties below are bound by the settlement agreement. Those facts also make moot ExxonMobil's second question presented, for if Sea Robin's offshore facilities are, indeed, subject to rate regulation under the NGA, whether or not FERC earlier should have required Sea Robin to obtain abandonment authority under the NGA for the subject facilities is of no consequence to Petitioners, at least so long as Sea Robin continues to own them.

4. The arcane issues raised in the Petitions are of only academic interest in the context of these cases, and need not be addressed. Sea Robin agrees with the opinion of the majority of the United States Court of Appeals for the D.C. Circuit below (*see* ExxonMobil Pet. at 1a-27a), and therefore considers it unnecessary to respond in detail to Petitioners' arguments on the merits. Suffice to say that the D.C. Circuit majority applied this Court's opinion in *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90 (1963), in a manner that is faithful to its holding. *See, e.g.*, ExxonMobil Pet. at 20a. If this Court were to reach the merits, the majority decision of the D.C. Circuit should be affirmed. If the Court were to reach the merits, it would

conclude, we respectfully submit, as the D.C. Circuit and the Fifth Circuit essentially concluded, that the issues under Section 1(b) of the NGA are intensely factual and *sui generis*. Therefore, any decision on the merits would necessarily follow *Northern Natural*, because it followed the statute, and would thus be of limited additional precedential value.

5. Petitioners would also have this Court grant the writ because of the alleged importance to production of gas on the Outer Continental Shelf of a ruling whether OCS facilities are subject to NGA rate regulation. But this claim is a vast overstatement. FERC has elsewhere found that 50 percent of OCS gas is not subject to the NGA in any event, because it is owned by entities like Petitioners rather than by entities such as Sea Robin. *Regulations Under the Outer Continental Shelf Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, Order No. 639, F.E.R.C. Stats. & Regs. Regs. Preambles [1996-2000] ¶ 31, 097, *order on reh'g*, Order No. 639-A, F.E.R.C. Stats. & Regs. Regs. Preambles [19976-2000] ¶31,103 (2000) at p. 31,674, *order denying clarification*, 93 F.E.R.C. ¶ 61,274 (2000), *vacated and enjoined, Chevron U.S.A. Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *appeal docketed sub nom. The Williams Cos. V. FERC*, No. 02-5056 (D.C. Cir., Feb. 5, 2002).[2]

6. Accordingly, the issues raised in both Petitions are unripe, or moot, because their fundamental premise, that Sea Robin's offshore facilities are *not* subject to rate regulation

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[2] But in any event Petitioners' claim of importance is incorrect, because any OCS facility not subject to NGA rate regulation is subject to the anti-discrimination provision of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1334 (2000), a point not discussed in the Petition in No. 02-1215, and alluded to only obliquely in ExxonMobil's Pet. at 28a. Even though FERC's OCSLA regulations are stayed (*see supra* ¶5), FERC retains statutory authority under the OCSLA and could regulate on a case-by-case basis. Thus, there is no "regulatory gap" created by the decisions at issue.

under the NGA, is mistaken. In any event, the majority decision of the D.C. Circuit was correct.

CONCLUSION

For the reasons stated herein, these cases are not appropriate for review by this Court, and the Petitions should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

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15 USCS § 717c (2003)

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§ 717c. Rates and charges

(a) Just and reasonable rates and charges. All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited. No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules. Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the

classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission. Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go

into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

APPENDIX B

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

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15 USCS § 717d (2003)

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§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates. Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract, affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation. The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and

determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

APPENDIX C

TITLE 43. PUBLIC LANDS
CHAPTER 29. SUBMERGED LANDS
OUTER CONTINENTAL SHELF LANDS

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43 USCS § 1334 (2003)

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§ 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations. The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this Act. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary

under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been

under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oil spill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before the date of enactment of this subparagraph [enacted Sept. 18, 1978], such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), to the extent that activities authorized under this Act significantly affect the air quality of any State.

(b) Compliance with regulations as condition for issuance, continuation, assignment, or other transfer of leases. The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act.

(c) Cancellation of nonproducing lease. Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this Act, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease. Whenever the owner of any producting lease fails to comply with any of the provisions of this Act, of the lease, or of the regulations issued under this Act, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this Act.

(e) Pipeline rights of way; forfeiture of grant. Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by

the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 21(b) of this Act [43 USCS § 1347(b)]) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act.

(f) Competitive principles governing pipeline operation.

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of

throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph [enacted Sept. 18, 1978]. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production.

(1) The leasee [lessee] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes. The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas. After the date of enactment of this section [enacted Sept. 18, 1978], no holder of any oil and gas lease issued or maintained pursuant to this Act shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas.

(1) Findings. [(A)] The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including—

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects. The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.